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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HOWARD EARL MCBRIDE,

Petitioner

v.

JOSEPH GALLEGOS, JR.,

Respondent and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. FOREWORD

A. Questions Presented: Issues Related to a Highly Corrupted Investigation

This group of questions are important to litigants generally, regardless of the specific issues involved, since they relate to the truthfulness of evidence presented and the court's diligence vs. blasé indifference to factuality in evidence:

1. In an "investigation" conducted by the Utah Antidiscrimination and Labor Division ("UALD"), whether the fact-finding function in an investigation (when the statute mandates "fairness to all parties") can be carried out legally by plagiarizing the assertions of one of the parties and transposing those assertions, without checking their validity, into official "findings", totally ignoring the other party's evidence.
2. Whether, to avoid charges of manufacturing fake evidence, a Determination and Order, illegally derived without a prior bona fide investigation, needs to explicitly warn its readers through a disclaimer that it was not prepared according to statutory requirements for fairness.
3. Whether extensive, one-sided evidence tampering invalidates an investigation.

B. Issues Related to Just Treatment of *Pro Se* and Senior Citizen Litigants

This group of issues are of particular relevance to Senior Citizens and/or *pro se* litigants, both of whom, as classes,

appear to have been regularly exploited by a malfunctioning legal system.

1. Whether, for a *pro se* litigant, the voluminous nature of his case (because of the scope of the wrongdoing involved and the care used in documenting such nullifies any of his 14th and 5th Amendment constitutional rights).
2. Whether age discrimination cases, likely to have a disproportionate share of *pro se* litigants (family income having been sharply reduced by the discriminatory firings) can be arbitrarily and capriciously dropped by judges (to reduce workload) because they tend to be easy targets and constitute a nuisance to the judge.

C. **Constitutional Issues—Due Process, Equal Protection, and Separation of Powers:** This group of issues is of critical importance to all citizens, involving all issues, and provides the foundation for respect by the citizenry of an uncorrupted legal process harmonizing with the Constitution, when that is the case.

1. Whether the effective denial of "**hearing**", by wholesale blocking of the introduction of evidence or wholesale ignoring of the evidence, meets "due process" standards and whether an administrative agency or court can legitimately raise the question of sufficiency of evidence when that entity itself systematically has either blocked the introduction of and/or ignored extensive existing documentary evidence.

2. Whether the Appellate Court erred regarding the sufficiency of Petitioner's complaint, and "need accept as true only the Petitioner's **well-pleaded** factual contentions…" which is a vague, ambiguous, arbitrary, capricious, biased, and "blank check" criterion.
3. Whether a judge acted arbitrarily, capriciously and unethically when he invented a theoretically "fair" investigation which never was (in order to support rulings of immunities), rather than accepting extensive, uncontroverted evidence to the contrary,
4. Whether the commonplace denial of redress by the judiciary to Senior Citizens, without regard to the actual merits of their cases, oversteps constitutional bounds and effectively rewrites the age discrimination laws from the bench, violating **separation of powers**.

D. <u>Unconstitutional Overreaching of Immunities Issues:</u>

This issue is of concern to all citizens who expect honesty, lack of abuse, and accountability in government. Whether judge-derived absolute quasi-immunities and/or qualified immunities can be extended to cover up cases wherever and to the extent serious violations of a Senior Citizen's constitutional rights have occurred.

E. <u>Issues Related to Dismissal of All Claims Against a Party with Prejudice:</u>

This group of issues is of concern to citizens opposed to adjudication by gimmickry instead of merit.

1. Whether the dismissal of a named conspiratorial defendant is legal when the grounds and criteria for dismissal violate many if not most of the criteria set by the Supreme Court.
2. Whether the Appellate Court erred in accepting as a grounds for dismissal the fact that Gallegos was not Petitioner's employer (making an invalid Title VII claim) when Petitioner never alleged such, but had claims against Gallegos based on conspiracy and obstruction of justice.
3. Whether lower courts erred in dismissing, using summary judgment procedures, a conspirator party to a case—when there were abundant, material issues of fact still existing, and there were many just reasons for carrying the litigation through to completion.

F. <u>Issues Related to Truthfulness, Evidence Handling, and the Integrity of the Legal Process</u> If citizens in general are to respect our legal system, that system needs to have far higher standards for fairness and truthfulness than were apparent in this case.

1. Whether a judge has the option of ignoring or impeding a Petitioner's use of *Reeves v. Sanderson Plumbing* (120 S. Ct. 2097) truthfulness standards in an age discrimination case.
2. Whether a state Attorney General's Office legally can resolve its conflict of interests arising out of an age discrimination case by electing to cover up a scandal, and provide legal

services at taxpayer expense to the perpetrator of significant and knowing constitutional rights violations, instead of fairly enforcing the law, acting to preserve the integrity of the legal process, and supporting the victim of the rights violations.

3. Whether the Appellate Court erred in concluding that Petitioner's case is based only on conclusory allegations when there is actually an over-abundance of evidence of various types, including all the eyewitness, uncontroverted, documentary and physical evidence the investigator deliberately ignored.

4. Whether the Appellate Court erred in asserting its unwillingness to supply additional factual allegations to round out a Petitioner's complaint or construct a legal theory on a Petitioner's behalf when neither of these was needed or requested.

5. Whether the Appellate Court erred in side-stepping the handling of key issues by mislabeling non-frivolous issues as if they were frivolous, such as: abuses of governmental power, unjust outcomes of the trial court, uneven enforcement of the Antidiscrimination statute [also an "equal protection" violation], inappropriate judgment for dismissing all claims against Mr. Gallegos with prejudice, condoning a cover-up of a corrupt legal process, bias in the trial court against Petitioner, and substitution of the trial court's own speculative theories in place of documentary evidence about the fairness of the investigation.

6. Since a *pro se* private individual and litigant confronting the cadres of lawyers defending a multi-billion corporation is already in a *David v. Goliath* relationship, whether it is appropriate for judges to further and unjustly imbalance this relationship by significant judicial bias, or to attempt by various artifices to intimidate a *pro se* litigant into dropping his case (e. g., the ruling to dismiss all claims against a key party with prejudice).

G. <u>Issues Related to Retaliatory Firing, Attempted Concealment of That Retaliation, and Denial of Protection for Filing a Complaint:</u>

This group of issues is of major concern to Senior Citizen and/or *pro se* litigants as well as workers in general who some day may face a retaliatory firing.

1. Whether a claim of non-retaliation based on a lie (later retracted) plus an obvious attempt at concealment is an adequate basis for denying Petitioner protection against a retaliatory firing for filing a discrimination complaint
2. Whether 7 instances of early notification (3 memos) by Petitioner to an employer about his planning to, then actually filing a formal discrimination complaint constitutes "constructive notification", thus legally blocking a retaliatory firing.
3. When a postmark date for a certified letter (the UALD's formal notification letter) is manipulated to create the false impression of non-retaliation, whether there is an affirmative

duty to identify that date as a "picked-up-at-the-post-office" date (under full control of the Defendant) rather than a "first-delivery" date (the normal assumption).

III. PRELIMINARY INFORMATION

A. List of Parties:

HOWARD EARL McBRIDE, *Petitioner,*

JOSEPH GALLEGOS, Jr., *Co-Conspirator-Respondent*

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, *Conspirator-Respondent*

B. Table of Contents

Pages

I. Foreword i

II. Questions Presented i

A. Issues Related to a Highly Corrupted Investigation i

B. Issues Related to Just Treatment of *Pro Se* and Senior Citizen Litigants i

C. Constitutional Issues—Due Process, Equal Protection, and Separation of Powers ii

D. Unconstitutional Overreaching of Immunities Issue iii

E. Issues Related to Dismissal of All Claims Against a Party with Prejudice iii

F. Issues Related to Truthfulness, Evidence Handling, and the Integrity of the Legal Process iv

Pages

G. Issues Related to Retaliatory Firing, Attempted Concealment of That Retaliation, and Denial of Protection for Filing a Complaint vi

III. PRELIMINARY INFORMATION vii

A. List of Parties vii

B. Table of Contents vii

C. Table of Authorities xvii

IV. PREPARATORY INFORMATION xxi

B. Introductory Prayer: Petition for Writ of Certiorari xxi

C. Citations of Opinions Below xxi

D. Jurisdiction xxi

E. Statutes xxii

V. STATEMENT OF THE CASE 1

A. Introduction 1

B. Petitioner's Initiation of a Discrimination Complaint and Early Notifications to Amex 1

Filing Original Discrimination Complaint 1

1. Petitioner's 3 Early Notification Memos to Amex about Filing a Formal Discrimination Complaint 1

C. Retaliatory Firing of Petitioner by Amex 2

1. Hiring and Firing 2

Pages

2. In Supplying a 2nd Excuse, Amex Tried to Conceal Its Retaliation by Refusing the Certified Notification Letter at First Delivery, Then Picking It Up Days Later at the Post Office 2

3. Denial to Petitioner of the Protection Employees Are Supposed to Have Against Retaliation for Filing a Discrimination Complaint 2

D. Conducting the Corrupted Investigation —Did Petitioner Receive a Bona Fide HEARING at the UALD? 3

1. Wholesale Blockage of Introduction and Consideration of Petitioner's Documentary Evidence 3

2. One Form of Known "Undue Influence" —Submittal by Amex on the Sly and Acceptance into Evidence by the UALD of a "Back Door", Crucial Document 3

3. Corroborative Physical Evidence—the Existing Determination and Order, etc. 3

4. Complete Absence of Verbal Inquiry 4

5. This Corrupted Investigation Denied Petitioner a HEARING at the UALD on the Real Merits of His Case 4

Pages

6. Close Collusion—UALD Investigator and Amex Lawyers 4

7. Petitioner's Factual Averments About the Corrupted Investigation Have Not Been Controverted by Contrary Evidence 4

8. Overview of the Results of the Corrupted UALD "Investigation" 5

E. Unconstitutional Invention by the Trial Court of a "Fair" Investigation That Never Was, So the Trial Court Could Apply (Misapply) Unconstitutional Immunities 5

1. The Trial Court Invented a "Fair" Investigation That Never Was 5

2. Lower Courts' Speculative "Fair" Investigation Seriously Mischaracterized Petitioner's Allegation 5

3. Petitioner's Real Allegation--A Totally Corrupted Investigation 6

4. The Trial Court Went Beyond Constitutional Bounds in Inventing Its "Fair Investigation" Fantasy 6

5. Ample Opportunity Existed to Provide Affirmative Evidence That a Fair Investigation Had Occurred, If That Had Been the Case 7

Pages

F. Petitioner's Audit of His Case File at UALD Revealed Systematic Evidence Tampering, Always Adverse to Petitioner, to Make the Case File Agree with That Corruptly Derived Determination and Order and to Conceal Petitioner's Contrary Evidence 7

1. Missing Documents 7
2. Amex Documents Not Served on Petitioner .. 8
3. Further Evidence Tampering at UALD 8

G. Preliminary Appeals Including Administrative Appeals 8

H. Commencement of Action in Federal Court 8

I. Substitution of Parties: Removal of the UALD As a State Organization and Substituting the Director (Gallegos) and Pena (Investigator) As Parties 8

J. Motion to Dismiss Gallegos as a Party—with Its 3 Grounds for Dismissal—and Dismissing All Claims Against Him with Prejudice 9

1. Separability and Distinctness of Claims and Parties 9
2. Courts' Erred in Assuming There Were NO Rule 54(b) JUST Reasons for Delay When There Were MANY Just Reasons 10

Pages

3. None of the Claims Against Gallegos Were Properly Adjudicated 10

4. The Remainder of Petitioner's Case Against Amex, Grossly Emasculated by the Courts' Unjust Dismissal with Prejudice of Gallegos, Continues in District Court 11

5. David-Pena, a Named Co-Conspirator, Is Not a Party; He Could Not Be Located and Served 11

K. Lower Courts Accepted the Fiction That Petitioner's Claims Against Gallegos Were Based on Title VII; Reality: Petitioners Claims Against Both Co-Conspirators Were Based on Conspiracy and Obstruction of Justice NOT Title VII 11

VI. REASONS WHY THE U. S. SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE 12

A. Lower Courts' Major Departures from Just Standards 12

B. Trial Court's Mishandling of This Case, Involving the Invention of the Fiction of a Fair Investigation That Never Was (Corruption in the Judiciary Itself) 13

Pages

C. The District Court Followed Illegal Procedures in Dismissing ALL Claims Against a Conspiratorial Party WITH PREJUDICE..... 14

D. U. S. Court of Appeals Decided Important Questions of Law Which Should Be Settled by the Supreme Court..... 15

E. Lower Courts Have Decided Federal Questions In Ways That Conflict with Applicable Decisions of the Supreme Court Itself..... 16

F. "Absolute Quasi-Judicial Immunity" Excuse..... 17

1. No Such Thing As a Truly "Absolute" Immunity..... 17

2. The Same Law Which Granted Gallegos' Powers Also Explicitly Mandated How Such Powers Were to Be Exercised (Not an Option)..... 17

3. No Bona Fide Hearing Conducted in This Case..... 17

4. Issuing an Evidentiary Report, the Determination and Order, Without a Preceding, Bona Fide Investigation Is a Fraud—a Collection of Faked Evidence..... 18

5. Restrictions on Immunities..... 18

Pages

6. A Dangerous Notion—Jurisdiction Alone Provides a Blank Check 18

7. Burden of Justifying Absolute Immunities 18

G. Improper Use of the "Qualified Immunities" Excuse 19

1. Violation of Clearly Established Rights 19

2. Violations Were Not "Gray Areas" but Extremes 19

3. Reasonable Presumption: Gallegos Understood the Provisions of the Statute He Is Charged with Enforcing as Well as "Due Process" and "Equal Protection" 20

4. Petitioner's Has the Right to Receive the Kind of Investigation Mandated by the Statute 20

5. Improperly Applied Immunities Undercut Remedies for the Violation of Federal Rights 20

6. Qualified Immunities Facilitate Governmental Actions 20

7. Government Action Without Fear of Consequences 21

8. Encouraging the Vigorous Exercise of Official Authority 21

9. Knowingly Violating the Law 21

Pages

10. Did Petitioner Allege Any Constitutional Rights Violations? 22

11. Clearly Established Rights 22

H. Lower Courts Have Decided Federal Questions in Ways Which Conflict with "Due Process" Rights of the 14th Amendment 23

1. Basic Essentials of Due Process 23

2. Courts Have an Affirmative Duty to Protect Rights 23

3. Proper Interpreting and Use of the Constitution 24

I. Lower Courts Have Decided Federal Questions in Ways Which Conflict with "Equal Protection" Rights 24

1. "Equal Protection" Defects Include 24

2. State Responsibility for Constitutional Rights Violations by Public Officials 25

3. "Equal Protection" of the Law is Mandatory; Both Federal and State Law Must Apply to All Alike 25

J. Constitutional Rights, Integrity of the Legal Process, and Honest Government Issues Are Not "Frivolous" 25

K. Factual Basis of Petitioner's Case 25

Pages

1. Appellate Court's Strange and False Assertion—No Specific Facts But Only Conclusory Statements Have Been Alleged by Petitioner 26

2. Courts' Attempt to Block or Limit the Further Introduction of Petitioner's Documentary Evidence 26

3. Appellate Court's Reluctance to Supply More Factual Allegations and Theories 26

4. Courts' Abuse of Discretion in Handling Petitioner's Factual Contentions 26

a) Appellate Court's Lip Service About Liberality to *Pro Se* Litigants While Attempting to Justify Wholesale Ignoring of His Evidence 26

b) Built-in Bias Against *Pro Se* Litigants (Often Senior Citizens) 27

c) When a Judge Ignores Blocks of Truthful Evidence, "Due Process" Is Violated 28

L. Need for Exercise of the Supreme Court's Supervisory Powers 28

VII. RELIEF REQUESTED 29

VIII. CONCLUSION 30

IX. APPENDICES A-1

C. Table of Authorities:

Pages

U.S. Constitution

14th Amendment 6, 13, 20, 23, 23, 23

5th Amendment 13

Separation of Powers (Articles I and III) 16

Federal Statutes

General 12

Title 28, §1331, U.S.C.A. 12

Title 18, 1983, U.S.C.A. 20

Conspiracy Against Rights

Title 18, § 241, U.S.C.A. 11

Obstruction of Justice

Title 18, § 1505, U.S.C.A. 12

Title 18, §1515 12

State Statutes

Utah Anti-Discrimination Act: *Utah Code Annotated*, 34A-5-107(3)(c)) 17

U. S. Supreme Court Decisions

Pages

Abstract of Antoine v. Byers & Anderson, Inc., et. al. (508 U. S. 429 [1993] 19

Allen v. United States, 164 U.S. 492 5

Brown v. Elliott, 225 U.S. 392 ..... 14, 24, 24

Buckley v. Fitzsimmons, 509 U. S. 259 (1993) 18

Pages

Burton v. Wilmington Parking Authority, 365 U.S. 715 25

Byars v. United States, 273 U.S. 28 24

Chapman v. California, 386 U.S. at 22, 23 .....14, 24

Cook v. Moffatt, 5 How 295 24

Crawford-El v. Britton, 523 U.S. 574, 1998 18

Curry v. McCanless, 307 U.S 7, 13

Curtiss-Wright v. General Electric *Co.*,

446 U. S. 1 .....9, 14, 17

Fairbanks v. United States, 181 U.S. 283 23

Foster v. Illinois, 332 U.S. 134 23

Frost v. Corporation *Commission*, 278 U.S. 515 25

Gomez v. Toledo, 446 U. S. 635, 639-640 20

Harlow v. Fitzgerald, 457 U. S. 800, 818 (1982) 19

Harman v. Forssenius, 380 U.S. 528 16

Hill v. Texas, 316 U.S. 400 25

Holden v. Hardy, 169 U. S. 366 4

Home Teleph. & Teleg. Co. v. Los Angeles, 227 U.S. 278 25

In Re Virginia, 100 U.S. 339 25

Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239 25

Kennedy v. Mendoza-Martinez, 372 U.S. 144 23

Kinsella v. United States, 361 U.S. 234 23

Kohl v. Lehlback, 160 U.S. 293 4

Lake County v. Rollins, 130 U.S. 662 24

Lawrence v. State Tax Commission, 286 U.S. 276 23-24

Louisiana ex. Rel. Francis v. Resweber, 329 U.S. 459 25

Miranda v. Arizona, 384 U.S. 436 24

Pages

Palmer v. Thompson, 403 U.S. 217 16

Pamela B. v. Mert, 709 A.2d 1089, 1992 18

Powell v. Alabama, 287 U.S. 45 ..... 4, 23

Reeves v. Beardall, 316 U.S. 283 9

Reeves v. Sanderson Plumbing, 120 S. Ct. 2097 ..... iv, 16

Schlib v. Kuebel, 404 U.S. 357 25

Slochower v. Board of Higher Education of New York City, 350 U. S. 551 23

Smith v. United States, 423 U.S. 1303 23

Sturges v. Crownshileld, 4 L. Ed. 529 24

Tilley v. County of Cook, 103 U.S. 155 5

United States v. Sprague, 282 U.S. 716 24

Weaver v. Palmer Bros. Co., 270 U.S. 402 16

U. S. Appeals Courts' Decisions

Pages

Hall v. Bellmon, 935 F. 2d 1106, 1110 (10th Cir. 1991) 16, 26, 27

Ledbetter v. City of Topeka, Kan., 318 F. 3d 1183, 1187 (10th Cir. 2003) 27

Other Authorities:

Pages

AARP TheMagazine (Vol. 46, No. 4C, July/Aug. 2003, p. 65), indicated that, in age discrimination cases, the Senior Citizen won **90%** of cases tried before a jury but only **33%** of cases tried before a judge only (a shocking **57** percentage point spread, indicating that many Senior Citizens are not receiving the redress to which they are entitled by the various discrimination statutes due to apparent major problems in the judiciary itself)..... 16, 27

IV. PREPARATORY INFORMATION

A. Introductory Prayer: Petition for Writ of Certiorari

Petitioner, Howard Earl McBride, respectfully prays that a Writ of Certiorari be granted to review the decision of the United States District Court for the Central District of Utah granting Motion for Summary Judgment in favor of the respondent and the affirmation of same by the United States Court of Appeals for the Tenth Circuit.

B. Citations of Opinions Below:

The district court dismissed the complaint based on **quasi-judicial immunity, qualified immunity for government officials, and failure to state a claim under Title VII.** The Appellate Court "rubber stamped" the Trial Court's dismissal in all aspects, filing its Order and Judgment on July 30, 2003.

C. Jurisdiction:

The basic age and disability discrimination case was brought against Defendant Amex pursuant to Title VII of the Civil Rights Act of 1964 as amended. Jurisdiction is specifically conferred on the Court by 42 U.S.C. § 2000e(5) et. seq., 42 U.S.C. §§ 1983, 1985 and 1988, 42 U.S.C. 12112 et. seq., 42 U.S.C. 12203, as well as 29 U.S.C §§ 626(c)(1) and 626(e). The specific claims against Director Gallegos are based on conspiracy against rights (Title 18 U.S.C. 241) and

obstruction of justice (Title 18 U.S.C. 1505 et. seq.). Statutory jurisdiction, then, is based on the court's general power to review all federal questions, as prescribed in 28 U.S.C. § 1331 (district court and appellate court general jurisdiction), as well as 28 U.S.C. 1254 (Supreme Court jurisdiction over appellate court rulings). Article III of the Constitution provides the constitutional basis for jurisdiction.

V. TEXT OF PETITION: STATEMENT OF THE CASE

A. Introduction:

Mr. Howard E. McBride, acting *pro se*, appeals the dismissal of his **conspiracy** and **obstruction of justice** complaint and removal as a party (related to an age discrimination case) against Mr. Joseph Gallegos, Jr. the director of a state anti-discrimination agency.

B. Petitioner's Initiation of a Discrimination Complaint and Early Notifications to Amex:

1. **Filing Original Discrimination Complaint:** While employed by American Express Travel Related Services Company ("Amex"), Petitioner filed a discrimination complaint against Amex with the Utah Division of Antidiscrimination and Labor ("UALD"), with an initial charge date of Oct. 12, 1999, and an amended charge (including retaliation) date of Dec. 20, 1999.

2. **Petitioner's 3 Early Notification Memos to Amex about Filing a Formal Discrimination Complaint:** Petitioner notified Amex in 3 memoranda (dated Sept. 11th, 24th, and 27th, 1999) about a month earlier that he was planning to or had filed a formal discrimination charge, with the latter 2 memoranda each being sent to 3 levels of management—making 7 early notifications in all. To convey the false impression of non-retaliation, Amex initially denied these early notifications, and that false denial became incorporated into the Determination and Order later produced. Amex later retracted that denial when its exhibit (Exhibit B) making the

denial became involved in an evidence tampering (disappearance) incident at the UALD but not until the Determination and Order was promulgated. Both Director Gallegos and Investigator Pena unsuccessfully tried to deny the existence of Exhibit B.

C. Retaliatory Firing of Petitioner by Amex:

1. **Hiring and Firing:** Petitioner was hired by Amex as a mainframe computer programmer when he was 65 years old, and was terminated 18 months later in an act of retaliation for his having filed a formal discrimination charge. Amex initiated its internal paperwork for firing Petitioner **on the same day** Petitioner received his parallel copy of the UALD's certified notice, mailed the same day, that Petitioner's case was being accepted for investigation..
2. **In Supplying a 2nd Excuse, Amex Tried to Conceal Its Retaliation by Refusing the Certified Notification Letter at First Delivery, Then Picking It Up Days Later at the Post Office:** Once at the Post Office, Amex had up to 15 business days in which to claim the UALD's certified letter (with the postmark date being under Amex control.
3. **Denial to Petitioner of the Protection Employees Are Supposed to Have Against Retaliation for Filing a Discrimination Complaint:** Petitioner was, and continues to be, denied the protection which supposedly prevents employers from retaliating against an employee who files a discrimination complaint.

D. <u>Conducting the Corrupted Investigation—Did Petitioner Receive a Bona Fide HEARING at the UALD?</u>

1. **Wholesale Blockage of Introduction and Consideration of Petitioner's Documentary Evidence:** On two separate occasions, Petitioner sent the UALD a photo of his **3" loose-leaf binder filled with eyewitness documentary evidence not yet considered** by the UALD. Investigator Pena elected **not to look at a single page**. Much of that eyewitness evidence was carefully written at or near the times when the respective discriminatory incidents occurred.

2. **One Form of Known "Undue Influence"—Submittal by Amex on the Sly and Acceptance into Evidence by the UALD of a "Back Door", Crucial Document:** One form of known "undue influence" was Amex's submittal to the investigator on the sly (without serving Petitioner) a response to Petitioner's amended complaint filled with falsehoods, which should not have been accepted into evidence. The investigator plagiarized the false assertions contained therein as his "findings" rather than doing an actual investigation. These plagiarisms became the main and almost total basis for the "findings" of the Determination and Order.

3. **Corroborative Physical Evidence—the Existing Determination and Order:** That Order, in its present condition, demonstrates the fruits of a highly corrupted investigation and provides ample physical evidence of the **corrupted process which produced it. Other uncontested** memoranda provide further corroboration.

4. **Complete Absence of Verbal Inquiry:** Petitioner was not asked a single question, not even over the phone, by prime Investigator Pena.

5. **This Corrupted Investigation Denied Petitioner a HEARING at the UALD on the Real Merits of His Case:** Petitioner's extensive, factual evidence was corruptly prevented by the "investigator" from being considered—thereby denying Petitioner a **hearing** on the **real merits of his case**., including consideration of such documents as: each of the early notification memoranda, detailed descriptions of the various discriminatory acts, rebuttals showing the pretextual nature of Amex' case, and descriptions of outrageous assignments given Petitioner (so unconscionable that, if given to other members of the professional staff, that entire staff would have to be fired). (*Powell v. Ala.*, 287 U.S. 45; *Holden v. Hardy*, 169 U. S. 366)

6. **Close Collusion—UALD Investigator and Amex Lawyers:** This case was assigned as its second and main investigator to a new hire, David Pena, who rushed this case to a premature conclusion, without ever considering Petitioner's side of the case. There was close, intricate collusion between Pena and Amex lawyers, the latter supplying the falsehoods and the former plagiarizing and recasting them into an official but **false** state evidentiary document.

7. **Petitioner's Factual Averments About the Corrupted Investigation Have Not Been Controverted by Contrary Evidence:** Thus, alleged facts are deemed true *(Kohl v.*

Lehlback, 160 U.S. 293), absence of contrary proof is presumed not to exist (*Tilley v. County of Cook*, 103 U.S. 155), and false evidence yields the presumption of guilt (*Allen v. United States*, 164 U.S. 492)

8. **Overview of the Results of the Corrupted UALD "Investigation":** Of the **13** arguable findings in the corrupted Determination and Order:

   a) **13** of the "findings" were **pro-Defendant** (100%).

   b) **13** of the "findings" were **false** (100%).

   c) **None** of the "findings" were derived in the manner mandated by law, requiring **every** investigation to be conducted in a manner **fair to all parties** (0%)

   d) **13** of **the** "findings" were derived by the investigator's **plagiarizing** them from the document submitted on the sly by Amex lawyers (100%)

E. Unconstitutional Invention by the Trial Court of a "Fair" Investigation That Never Was, So the Trial Court Could Apply (Misapply) Unconstitutional Immunities:

1. **The Trial Court Invented a "Fair" Investigation That Never Was:** The trial court impermissibly invented a speculative scenario theorizing that a "fair" investigation had occurred--a theory thoroughly controverted by the record--in an **unethical** attempt to justify wide-ranging immunities negating constitutional rights.

2. **Lower Courts' Speculative "Fair" Investigation Seriously Mischaracterized Petitioner's Allegation:**

The Appellate Court described Petitioner's allegation as:

> "...Gallegos violated his due process rights by **failing to conduct a thorough, impartial investigation** prior to dismissing his complaint."

This is a monstrous mischaracterization for it artificially assumes a "business as usual", normal investigation, which then wouldn't rise to the level of constitutional rights violations, which the lower courts didn't want to recognize.

3. **Petitioner's Real Allegation--A Totally Corrupted Investigation:** The real issue is not that Gallegos "did not conduct a **thorough** investigation", which implies a continuum of varying degrees of thoroughness, as one might expect to see in a series of "normal" investigations. The real issue is that he did not conduct **any investigation at all (or so token as to be negligible)** insofar as Appellant's side of the case was concerned--and that **DOES** rise to the level of a self-evident Constitutional violation **by the express language of the 14th Amendment itself.** How can an "investigation" which has been paid essentially **zero attention to Appellant's side of the case NOT** rise to the level of a constitutional violation?

4. **The Trial Court Went Beyond Constitutional Bounds in Inventing Its "Fair Investigation" Fantasy:**

> "Although fictions [the fiction of a "fair investigation" here] are sometimes invented in order to realize judicial conceptions of justice, the courts are without power to define the constitutional guaranty of due process of law

in terms of a fiction unrelated to reality, without exercising a power to remake constitutional provision which the Constitution has not given them." (*Curry v. McCanless*, 307 U.S. 357)

5. **Ample Opportunity Existed to Provide Affirmative Evidence That a Fair Investigation Had Occurred, If That Had Been the Case:** There has been ample opportunity for Gallegos to supply contrary, affirmative evidence supporting the notion that a fair investigation had occurred, but it can't be honestly supplied, because it didn't happen. Gallegos' defense relied solely on judge derived, but unconstitutional, immunities.

F. <u>Petitioner's Audit of His Case File at UALD Revealed Systematic Evidence Tampering, Always Adverse to Petitioner, to Make the Case File Agree with That Corruptly Derived Determination and Order and to Conceal Petitioner's Contrary Evidence:</u>

The corrupted contents of the Determination and Order prompted Petitioner to do an audit of his case file at the UALD. In Petitioner's memo to Director Gallegos dated June 26, 2001, Petitioner reported extensive evidence tampering:

1. **Missing Documents:** Of Petitioner's then existing 275 documents, 8 high priority and 29 medium priority files were missing in the UALD case file (listed in Exhibit A). The findings of Petitioner's audit were never challenged, just ignored, by both the UALD and the lower courts.

2. **Amex Documents Not Served on Petitioner:** Exhibit B of the same memo listed files in the UALD case file which improperly had never been served on Petitioner.

3. **Further Evidence Tampering at UALD:** Six of Petitioner's documents were mailed to the UALD on April 18, 1999 (about a month before the Determination and Order was issued). Four of these six documents also disappeared from the case file (one disappearing for the second time). The two surviving documents were emasculated.

G. **Preliminary Appeals Including Administrative Appeals:** Petitioner appealed in 3 directions, the Utah Labor Division, the EEOC, and the Adjudication Division. In a hearing before Judge Donald George of the Adjudication Division, because of the corrupted processes which had occurred, Petitioner was granted the right to sue--dated Sept. 13, 2001.

H. **Commencement of Action in Federal Court:** On December 10, 2001, Petitioner brought a Title VII, ADEA, and ADA discrimination complaint in federal district court against Amex, also alleging conspiracy and obstruction of justice by the UALD.

I. **Substitution of Parties: Removal of the UALD As a State Organization and Substituting the Director (Gallegos) and Pena (Investigator) As Parties:** The UALD moved to dismiss the claim against it based on Eleventh Amendment immunity and because it was not Petitioner's employer, an allegation never made by Petitioner. The district court dismissed the complaint against the UALD on April 10, 2002,

(docket 24-1) but allowed Petitioner the opportunity to amend (substituting two private individuals in place of the UALD as a state organization). Petitioner therefore prepared and filed an Amended Complaint on May 21, 2002 (Docket No. 25-1).

J. <u>Motion to Dismiss Gallegos As a Party—with Its 3 Grounds for Dismissal—and Dismissing All Claims Against Him with Prejudice:</u> In his amended complaint, Petitioner named the UALD director, Mr. Gallegos as a co-conspirator defendant. Mr. Gallegos filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted the motion on September 13, 2002, based on **quasi-judicial immunity**, **qualified immunity** for government officials, and **failure to state a claim under Title VII**. Illegal procedures were followed in trying to sever Gallegos as a party:

1. **Separability and Distinctness of Claims and Parties:** *Reeves v. Beardall* (316 U.S. 283) indicates separate judgments may be allowable where the claims are **entirely distinct,** but in this case, the claims are **closely intertwined** as Amex lawyers supplied falsehoods and the "investigator", **in close collusion**, incorporated those falsehoods into an official state document. Where such close collusion exists, a conspirator can become liable for actions of co-conspirators done in furtherance of the conspiracy. (See Part D above.) There is also a lack of separability of claims from the remainder of claims in the rest of the case (*Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1)

2. **Courts' Erred in Assuming There Were NO Rule 54(b) JUST Reasons for Delay When There Were MANY** (*Id.*):

   a) Just reasons for delay included Petitioner's right to unfettered challenging of every falsehood in the corruptly derived Determination and Order.

   b) No sound weighing was done of the equities involved—Petitioner's equities were simply ignored.

   c) Assessments were not supported by the record; rather, the Trial Court ignored almost the totality of Petitioner's documentary evidence (*Id.*).

   d) A particularly glaring example of the Trial Court's mishandling of Petitioner's evidence of this case was relative to the reading and "due diligence" consideration of Petitioner's *Counter-Motion Memorandum to Deny the Gallegos Motion to Dismiss the Amended Complaint in McBride v. American Express Travel.* This powerful document thoroughly rebutted every one of the proffered grounds for dismissal. Separate exhibits covered each of the unconstitutional immunities being claimed, the courts' ignoring the explicit limits of the cases cited, and the contrived and preposterous ground for dismissal that Gallegos was not Petitioner's employer. Appendix A gives extracts from this Counter-Motion.

3. **None of the Claims Against Gallegos Were Properly Adjudicated:** With the meat-ax dismissal of **all claims**, each with its own independent set of facts, and that **with**

prejudice, none of Petitioner's claims have received proper consideration and adjudication.

4. **The Remainder of Petitioner's Case Against Amex, Grossly Emasculated by the Courts' Unjust Dismissal with Prejudice of Gallegos, Continues in District Court:** In a generic sense, the court itself has been obstructing justice, hardly an appropriate thing for a court to do. Besides the rulings' encouraging corruption, Petitioner is impeded in using discovery and interrogatory processes to delve into the details of the corruptive legal process which defied both statute and Constitution in exploiting a Senior Citizen.

5. **David Pena, a Named Co-Conspirator, Is Not a Party; He Could Not Be Located and Served:** Petitioner's amended complaint also named Mr. David Pena as a defendant. Mr. Pena was the UALD employee assigned to investigate Petitioner's discrimination charges. Rather than face rigorous cross-examination, Mr. Pena resigned from the UALD after 6 months service, disappeared from view, and was not served. Thus he is not a party to the lawsuit

K. Lower Courts Accepted the Fiction That Petitioner's Claims Against Gallegos Were Based on Title VII; Reality: Petitioner's Claims Against Gallegos Was Based on Conspiracy and Obstruction of Justice NOT Title VII: Nowhere in the record will one find either Gallegos or Pena being treated as if he were Petitioner's employer. Many examples to the contrary can be found. Alternatively conspiracy against rights is treated under Title 18, § 241,

U.S.C.A. and obstruction of justice under Title 18 § 1505, U.S.C.A., with sample definitions in §1515. General jurisdiction over federal questions applies (Title 18 §1331).

VI. REASONS WHY THE U. S. SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE:

A. Lower Courts' Major Departures from Just Standards:

1. Lower courts accepted the fiction that Petitioner's claims against Gallegos were based on Title VII, never alleged by Petitioner; in reality, they were based on conspiracy and obstruction of justice
2. Gallegos (the illegally "dismissed" party) was responsible for carrying out a totally corrupted "investigation"—a complete lack of **hearing** of Petitioner's side of the case.
3. The "investigation" violated explicit state law requiring conduct to be "fair to all parties". Courts ignored it.
4. The "investigator" systematically blocked the introduction and consideration of Petitioner's extensive, eyewitness, documented evidence while accepting every assertion, without validation, made by Defendant in a document slipped to investigator "on the sly" (without its having been served on Petitioner).
5. The contents of the Determination and Order, signed by Gallegos, is physical evidence corroborative of Petitioner's eyewitness evidence, as are several unchallenged memoranda written at the time.

6. Much evidence tampering, always adverse to Petitioner, and manufacturing of fake evidence occurred, including attempted concealment of Petitioner's evidence.
7. Gallegos' counsel, having ample opportunity, did not challenge Petitioner's allegations or offer affirmative evidence that a fair investigation had occurred; rather, the defense relied solely on immunities.
8. Director Gallegos had the ultimate and statutory responsibility for the hiring, training, and supervising of investigators to assure that investigations complied with the law. This one didn't.

B. <u>Trial Court's Mishandling of This Case, Involving the Invention of the Fiction of a Fair Investigation That Never Was (Corruption in the Judiciary Itself)</u>

1. The Trial Court, dealing with a *pro se* litigant, elected to **invent a hypothetical "fair" investigation** to replace the real investigation, so that immunities could be conferred, and it wouldn't have to deal with the obvious and severe violations of Petitioner's 14th Amendment rights.
2. This **unethical** act of the Trial Court was unconstitutional itself (*Curry v. McCanless*, 307 U.S. 357)
3. The Trial Court's fictional replacement investigation did not arise out of the evidence of the case, but out of that court's extensive ignoring of uncontested evidence.
4. The judge-derived immunities, based on a "fair" investigation that never was, supposedly were able to **negate entirely** Petitioner's 14th and 5th Amendment

rights to **Due Process** and **Equal Protection.** The lower courts failed to recognize that some constitutional rights are **so basic** that their violation **can never be harmless error** (*Chapman v. California,* 386 U.S. at 22, 23).

5. Condoning by the lower courts of concealment of an utterly corrupted investigation, impermissibly uses the Constitution for covering up crime and law-breaking (*Brown v. Elliott*, 225 U.S. 392),

C. <u>The District Court Followed Illegal Procedures in Dismissing ALL Claims Against a Conspiratorial Party WITH PREJUDICE</u>

1. Many illegal procedures were followed by the Trial Court in its dismissal, including: lack of distinctness and separability of claims, arguing no just reasons for delay when many existed, ignoring Petitioner's equities entirely, unsound juridical weighings because of joint liabilities, lack of support in the record, and extensive harm to other issues in the remainder of the case. (*Curtiss-Wright v. General Electric Co.*, 446 U. S. 1)
2. The Appellate Court ignored many restrictions coming from the same cases it was citing for justification of its affirmation of the ruling, such as: numerous factual disputes between the Determination and Order and Petitioner's factual pleadings, the parallel between the *Martinez* report and the Determination and Order, vagueness of the Appellate Court's justification, and not giving a *pro se* litigant the chance to amend pleadings.

3. Among the claims dismissed with prejudice were very serious ones: extensive evidence tampering, collusive manufacturing of fake evidence, illegal derivation of all 13 arguable findings in the Determination and Order, etc.
4. The Appellate Court was well aware of the many genuine and serious issues relative to material facts that exist in this case, and explicitly side-stepped addressing many of them by subsuming them under a patently illegal dismissal (see footnote 5 of Appellate ruling), pronouncing them as "frivolous" when they were anything but "frivolous".

D. <u>U. S. Court of Appeals Decided Important Questions of Law Which Should Be Settled by the Supreme Court</u>

1. The Appellate Court abused its discretion when, for a *pro se* litigant, it ruled that a District Court can arbitrarily throw out large proportions of Petitioner's eyewitness, carefully written evidence, because it is construed to be vaguely "not well pleaded" (to such an extent that Petitioner has had no meaningful **hearing on the merits**, along with a lack of documentation by the court as to the specific grounds for removal or ignoring of each of many items)—yet the courts then strangely pretended that no or insufficient evidence has been provided.
2. The Appellate Court's ruling contradicts its own ruling which **presumes all of Petitioner's factual allegations are true and construes in light most favorable to Petitioner**. [taking into account factors like]…**his**

unfamiliarity with pleading requirements" (*Hall v. Belllmon*, 935 F.2d 1106 and 1107)

E. <u>Lower Courts Have Decided Federal Questions In Ways That Conflict with Applicable Supreme Court Decisions:</u>

1. The dismissal of all claims with prejudice is a gimmicky way for a freewheeling Trial Court to say it does not want to allow the unanimously decided *Reeves v. Sanderson Plumbing* Supreme Court decision, 120 S. Ct. 2097, to be applied in this case, so will impede by the bizarre dismissal Petitioner's ability to use that decision.
2. *Pro se* litigants have the same constitutional rights as any other citizen, even when the lower courts do not want to recognize such. (See, for example, *Harman v. Forssenius*, 380 U.S. 528, *Palmer v. Thompson*, 403 U.S. 217, *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, etc.)
3. The systematic exploitation of Senior Citizens (often *pro se* litigants) by the judiciary is a violation of **separation of powers**, wherein judges arrogate to themselves the prerogative of legislating from the bench, in practice nullifying the redress for age discrimination enacted by Congress. The frequency of this judicial violation may be seen from the fact, reported in AARPThe Magazine (July/August 2003, p. 65) that Senior Citizens win **90%** of their cases tried before a jury but only **33%** of their cases tried before a judge only. That huge **57** percentage point spread indicates that many Senior Citizens are not

receiving the redress to which they are entitled based on the actual merits of their cases.

4. This case is a classic case of detailed reasons why and how Senior Citizens, whose family income becomes sharply reduced by discrimination hence are forced to become *pro se* litigants, are being exploited by the courts.
5. The lower courts have refused to follow Supreme Court rulings governing summary judgments and dismissing parties. (For example, see rules given in *Curtiss-Wright v. General Electric Co.*, 446 U. S. 1)

F. "Absolute Quasi-Judicial Immunity" Excuse:

1. **No Such Thing As a Truly "Absolute" Immunity:** Under our limited form of government with its checks and balances, every governmental official, law, ruling, etc. is subservient to the Constitution. Judge-derived immunities do not take precedence over the rights to citizens granted by the Constitution (many Supreme Court decisions agree).
2. **The Same Law Which Granted Gallegos' Powers Also Explicitly Mandated How Such Powers Were to Be Exercised (Not an Option):** "The division and its staff, agents, and employees shall conduct every investigation in fairness to all parties and agencies involved..." (*Utah Code Annotated*, 34A-5-107(3)(c)).
3. **No Bona Fide Hearing Conducted in This Case:** Gallegos has the power to conduct hearings but no bona fide hearing took place in this case. A series of plagiarisms is not an

investigation, nor is there even a glimmer of fairness in the illegal methodology actually followed.

4. **Issuing an Evidentiary Report, the Determination and Order, Without a Preceding, Bona Fide Investigation Is a Fraud—a Collection of Faked Evidence:** There were no disclaimers in the Determination and Order warning readers that it was not produced in a manner complying with the law, or that it was produced without the benefit of a preceding, bona fide, impartial investigation.

5. **Restrictions on Immunities:**

   a) Most public officials are entitled only to qualified immunity (*Buckley v. Fitzsimmons*, 509 U. S. 259 (1993).

   b) Weighing of interests are required *(Pamela B. v. Mert,* 709 A.2d 1089, 1992 and *Crawford-El v. Britton*, 523 U.S. 574, 1998).

6. **A Dangerous Notion—Jurisdiction Alone Provides a Blank Check:** The Gallegos Motion describes the doctrine of absolute judicial immunity as meaning:

   > "...a state judge was immune from damages, even if the judge's actions were in error, were done maliciously, or were in excess of his authority, and that the judge **could only be subject to liability if he acted 'in clear absence of all jurisdiction'**..."

   Not even the Supreme Court has the legitimate right to violate Constitutional rights of citizens.

7. **Burden of Justifying Absolute Immunities:**

"...Respondents bear the burden of establishing the justification for the absolute immunity they claim..." *(Abstract of Antoine v. Byers & Anderson, Inc., et. al.* (508 U. S. 429 [1993]).

This has not been done nor can it be done.

G. Improper Use of the "Qualified Immunities" Excuse:

1. Violation of Clearly Established Rights:

a) The **Appellate** Court stated in its ruling:

"Second, he *[Director Gallegos]* is also protected under the doctrine of qualified Immunity, which shields government officials **'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"** *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982)...

b) **Both Constitutional and Statutory Rights Were Violated:** This is precisely the critical point for qualified immunities. The conduct of Director Gallegos and Investigator Pena clearly **violated both established statutory and constitutional rights of which a reasonable person would have known**, and those violations are clear enough to be **self-evident**.

2. Violations Were Extreme NOT "Gray Area" Violations: The manner in which the investigation was conducted not only violated statutory law, but was the very kind of a dishonest and manipulated investigation the legislature intended to prevent by the express wording of the statute.

3. **Reasonable Presumption: Gallegos Understood the Provisions of the Statute He Is Charged with Enforcing as Well as "Due Process" and "Equal Protection":** Gallegos can be reasonably presumed to understand his statutory duty regarding the conducting of **impartial** investigations in every case covering **all** allegations as well as 14th Amendment rights. The contrary presumption cannot reasonably be made.

4. **Petitioner's Has the Right to Receive the Kind of Investigation Mandated by the Statute:** The assumed shielding desired by Gallegos is inapplicable because Director Gallegos seriously violated Petitioner's constitutional rights and statutory right to receive the kind of impartial investigation mandated by the state's anti-discrimination law. This didn't happen.

5. **Improperly Applied Immunities Undercut Remedies for the Violation of Federal Rights:** When immunities are inappropriately applied, the result:

   "...undermines § 1983's very purpose--to provide a remedy for the violation of federal rights." (See, e. g., *Gomez v. Toledo*, 446 U. S. 635, 639-640).

6. **Qualified Immunities Facilitate Governmental Actions:** The Appellate Court argued against its own conclusions:

   "Qualified immunity allows for government action **while at the same time protecting the clearly established rights of the individual**..."

Where has the rights' protection been hiding in this case? It hasn't happened yet.

7. **Government Action Without Fear of Consequences:**

The Appellate Court further argued against its own rulings:

> "[W]here an official's duties legitimately require **action in which clearly established rights are not implicated**, the public interest may be better served by action taken 'with independence and without fear of consequences.'..."

The hoax of an investigation (see Part V(D) above) place this case clearly within the above stated exception.

8. **Encouraging the Vigorous Exercise of Official Authority:**

More on the Appellate Court's arguing against itself:

> "...The qualified immunity doctrine protects the exercise of discretion in an effort to **promote the public interest in encouraging the vigorous exercise of official authority**..."

History is replete with examples of abuses of authority — including the series of abuses which occurred in this case. For example, the concealment of wrongdoing by misapplying unconstitutional immunities clearly is not in the public interest but is powerfully destructive of that interest.

9. **Knowingly Violating the Law:** The Appellate Court stated:

> "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the

plainly incompetent or **those who knowingly violate the law**..."

Director Gallegos knowingly violated the law (see all of VI(F) and (G) above).

10. **Did Petitioner Allege Any Constitutional Rights Violations?** The Trial Court offered this boner:

> "...Thus, the Court must first determine **whether** the Petitioner has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right **was clearly established at the time of the alleged violation**..."

The Trial Court's utter lack of awareness of the scores of Petitioner's references to constitutional rights violations indicated how superficially the Trial Court had treated Petitioner's documentary evidence. One of many examples: Petitioner sent a memorandum dated July 12, 2001, to Charles Burtner, EEOC District Director (copied to Director Gallegos) which detailed the total corruption of the investigation, the lack of Due Process, the extensive evidence tampering, etc.

11. **Clearly Established Rights:** Gallegos' counsel alleged:

> "Even if the deprivation of a constitutional right is assumed to have occurred, **Petitioner cannot demonstrate the right was clearly established at the time of the violation**."

This assertion is ridiculous nonsense. Petitioner's 14th Amendment, self-evident **due process** and **equal protection** rights arose on July 9, 1868 (the ratification date).

H. Lower Courts Have Decided Federal Questions In Ways Which Conflict with "Due Process" Rights of the 14th Amendment Freewheeling lower court judiciaries have had great difficulty in understanding and protecting 14th Amendment rights, which read in part:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, **without due process** of law; nor deny to any person within its jurisdiction the **equal protection** of the laws."

1. **Basic Essentials of Due Process:** Notice and hearing (*Powell v. Alabama*, 287 U.S. 45), protection from arbitrary exercise of governmental power (*Slochower v. Board of Higher Education of New York City*, 350 U. S. 551), fundamental fairness (*Kinsella v. United States*, 361 U.S. 234, and others), and not satisfied by mere formal correctness (*Foster v. Illinois*, 332 U.S. 134). (Also note: *Fairbanks v. United States*, 181 U.S. 283, *Smith v. United States*, 423 U.S. 1303, and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144.)

2. **Courts Have an Affirmative Duty to Protect Rights:** "The constitutional guaranty of rights…to the citizen

insures to him the privilege of having those rights and immunities judicially declared and protected."

(*Lawrence v. State Tax Commission*, 286 U.S. 276).

Moreover:

> "...it is the **duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon**." (*Byars v. United States*, 273 U.S. 28)

In this case, one could have difficulty telling whether the courts are the protector or the predator of such rights.

3. **Proper Interpreting and Use of the Constitution:** Disregarding the plain meaning of the Constitution is improper (*Sturges v. Crownshileld*, 4 L. Ed. 529); when not ambiguous, courts are not at liberty to look beyond the Constitution for its meaning (*Lake County v. Rollins*, 130 U.S. 662); and the obvious meaning understood by voters must be accepted (*United States v. Sprague*, 282 U.S. 716). (Also note: *Cook v. Moffat*, 5 How 295, *Miranda v. Arizona*, 384 U.S. 436, *Brown v. Elliott*, 225 U.S. 392, and *Chapman v. California,* 386 U.S. at 22, 23).

I. Lower Courts Have Decided Federal Questions In Ways Which Conflict with "Equal Protection" Rights:

1. **"Equal Protection" Defects Include:** Immunities should not be vehicles for cover-ups (*Brown v. Elliott*, 225 U.S. 392); corrupt enforcement negates discrimination laws (i. e., if other discrimination cases are mishandled as this one was, there may as well not be any laws against discrimination).

2. **State Responsibility for Constitutional Rights Violations by Public Officials**: Examples: State authority aiding the wrongdoer, exceeding legitimate authority and violating special commands (*Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 and *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U.S. 278); and attempted abdication of responsibility by ignoring rights violations (*Burton v. Wilmington Parking Authority*, 365 U.S. 715) [a principle that rightly applies to judges as well]. (Also note: *In Re Virginia*, 100 U.S. 339, *Frost v. Corporation Commission*, 278 U.S. 515, and *Schlib v. Kuebel*, 404 U.S. 357).

3. **"Equal Protection" of the Law is Mandatory; Both Federal and State Law Must Apply to All Alike:**

   "Equal protection of the laws…is a command which the **state must respect,** the benefits of which every person may **demand**." (*Hill v. Texas*, 316 U.S. 400; also see *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459)

J. Constitutional Rights, Integrity of the Legal Process, and Honest Government Issues Are Not "Frivolous":

The Appellate Court side-stepped a series of serious issues as being "frivolous", which were supposedly subsumed beneath a transparently illegal dismissal (See Part V(J) above.): abuse of governmental power, unjust outcome of the Trial Court, uneven enforcement of the anti-discrimination statute, and arbitrary judgment for dismissing all claims with prejudice against Director Gallegos.

K. Factual Basis of Petitioner's Case:

1. **Appellate Court's Strange and False Assertion—No Specific Facts but Only Conclusory Statements Have Been Alleged by Petitioner:** In reality, this case has involved an over-abundance of eyewitness, uncontroverted, documentary evidence, much unread by the courts.

2. **Courts' Attempt to Block or Limit the Further Introduction of Petitioner's Documentary Evidence:** The Trial Court's "dismiss all claims with prejudice" order attempts to prevent the further introduction of Petitioner's evidence regarding each of the falsehoods in that Determination and Order, including an "interlinear" version of that Order which shows what the investigator should have discovered if he had considered both sides of the case.

3. **Appellate Court's Reluctance to Supply More Factual Allegations and Theories:** Neither was needed or requested by Petitioner. This "boilerplate" critique, fresh out of a word processing file, might apply to some other case, but certainly doesn't apply to this one. Before getting too nit-picky, the Appellate Court might have carefully re-read the full context, restrictions and limitations of its own citations. (*Hall v. Bellmon*, 935 F. 2d 1106 (10th Cir. 1991)).

4. **Courts' Abuse of Discretion in Handling Petitioner's Factual Contentions:**

   a) **Appellate Court's Lip Service About Liberality to *Pro Se* Litigants While Attempting to Justify Wholesale Ignoring of His Evidence:** The Appellate Court claimed it was construing Petitioner's *pro se* pleadings liberally,

using a less stringent standard (*Ledbetter v. City of Topeka, Kan.*, 318 F. 3d 1183, 1187 (10th Cir. 2003)). Concurrently, it was trying to justify the ignoring of large bodies of Petitioner's evidence on this basis:

> "Moreover, in analyzing the sufficiency of the [pro se] Petitioner's complaint, the court **need accept as true only the Petitioner's well-pleaded factual contentions**, not his conclusory allegations." *Hall v. Bellmon*, 935 F. 2d 1106, 1110 (10th Cir. 1991).

This doctrine reveals a dangerous legal precept when discretion is abused by the court. It is lacking in specificity, allowing a court to do arbitrary and capricious tinkering with the facts of a case for reasons unrelated to dispensing justice (such as reducing one's personal workload), gives too much weight to formal correctness at the expense of truthfulness and substance, and can generate huge travesties of justice.

b) Built-in Bias Against Pro Se Litigants (Often Senior Citizens): Is this dangerous legal doctrine a major reason senior citizens win **90%** of their discrimination cases tried before a jury, but only **33%** of such cases tried before a judge only? If so, senior citizens are being exploited by the legal system—regularly denied the redress to which the inherent merits of their cases entitle them. There is an obvious need for careful checks and balances over such an arbitrary power wielded by judges. The **well-pleaded** criterion provides a ready excuse for hiding a variety of

mishandling characteristics, including: a judge's lack of due diligence, lack of a meaningful hearing, bias against a litigant, all of the above, etc.

c) **When a Judge Ignores Blocks of Truthful Evidence, "Due Process" Is Violated:** In such circumstances, a case is not being adjudicated based on its real merits –and is unworthy of the respect of the citizenry. Sometimes, the court's ignoring of even one truthful evidentiary document can have major unjust consequences. For example, the Trial Court ignored the retracted lie supporting supposed non-retaliation, so Petitioner still hasn't received the protection against employer retaliation due when an employee files a discrimination complaint. .

L. To Remedy Abuses, This Case Calls Also for the Exercise of the Supreme Court's Supervisory Powers

1. The Senior Citizens being exploited are one of the most vulnerable groups in our society, and have the most difficulty in finding replacement jobs in an economy where growth in the number of jobs is fairly flat.
2. The courts will experience a rapidly growing future problem as "baby boomers" reach the age of coverage of age discrimination laws, unless better ways of handling such cases are developed, or the incidence of such cases is reduced. For example, Petitioner's case, messy to the judiciary, could have been resolved without litigation at several points in its case history.

3. The Supreme Court is the **last opportunity** for the legal system to clean up the legal process's own dirty laundry, defusing any need for Senior Citizens to mobilize themselves to curb the illegal and biased exploitations.
4. Serious breaches of judicial duty occurred regarding the protection of constitutional rights, alertness regarding the fairness of the fact-finding process, judicial usurpations of authority not given them by the Constitution, invention by the judiciary of a "fair" investigation that never was so Petitioner's constitutional rights could be negated by a series of unconstitutional immunities, wholesale ignoring of Petitioner's eyewitness evidence, etc.
5. This is a great pedagogical case for law students, being a classic example of how the Justice System should NOT operate relative to constitutional law, age discrimination, handling of cases by *pro se* litigants, and ethics. The Supreme Court has the **opportunity of writing the last chapter** of the textbook, showing that the legal system can handle its own abuses effectively.

VII. RELIEF REQUESTED:

1. Overrule dismissal of all claims with prejudice against Director Gallegos.
2. Remand this case back to the UALD to conduct the honest and impartial investigation mandated by the statute (under court supervision)—the investigation which should have happened the first time around.

3. Remand this case back for a new trial under a different Trial Judge--one who is free from bias against Senior Citizen/*pro se* litigants. If such an impartial judge cannot be found, then convert the new trial into a jury trial.
4. Take whatever disciplinary action is deemed appropriate regarding the Trial Court's invention of a fictional investigation that never was coupled with the consequent bestowal of unconstitutional immunities to hide wrongdoing rather than render justice.
5. Where judges ignore substantial uncontested evidence, require such judges to document just reasons for so doing on each item, subject to challenge if not meritorious.
6. So that other Senior Citizen/*pro se* litigants will not be abused by the legal process in the same manner as Petitioner has been, rule on each of the issues and abuses defined above in Part I(A), or selections therefrom as the Court may deem appropriate.

VIII. CONCLUSION

This case is about a legal system running amok, out of control—out of control of the Constitution, out of control of governing Supreme Court decisions, out of control of standards of ethics, out of control of applicable age discrimination laws, and out of control of even the most basic concepts of fairness and justice.